

AMENDED IN ASSEMBLY MAY 7, 2009  
AMENDED IN ASSEMBLY APRIL 13, 2009  
AMENDED IN ASSEMBLY MARCH 26, 2009

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

## ASSEMBLY BILL

**No. 120**

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**Introduced by Assembly Member Hayashi**  
**(Coauthor: Assembly Member Emmerson)**

January 15, 2009

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An act to amend Sections 809, 809.2, and 809.3 of, and to add Sections 809.04, 809.07, and 809.08 to, the Business and Professions Code, relating to healing arts.

### LEGISLATIVE COUNSEL'S DIGEST

AB 120, as amended, Hayashi. Healing arts: peer review.

Existing law provides for the professional review of specified healing arts licentiates through a peer review process conducted by peer review bodies, as defined.

This bill would encourage a peer review body ~~of a health care facility~~ to obtain external peer review, as defined, for the evaluation or investigation of an applicant, ~~privilege holder~~ *privilegeholder*, or member of the medical staff ~~of the facility~~ in specified circumstances.

This bill would require a peer review body to respond to the request of another peer review body and produce the records *reasonably* requested concerning a licentiate under review, *as specified*. The bill would specify that the records produced pursuant to this provision are not subject to discovery, as specified.

Existing law requires the governing body of acute care hospitals to give great weight to the actions of peer review bodies and authorizes

the governing body to direct the peer review body to investigate in specified instances. Where the peer review body fails to take action in response to that direction, existing law authorizes the governing body to take action against a licensee.

This bill would prohibit a member of a medical or professional staff from being required to alter or surrender staff privileges, status, or membership solely due to the termination of a contract between that member and a health care facility, *except as specified*. The bill would specify that a peer review body is entitled to review and make recommendations to the governing body of a health care facility regarding the quality implications of *considerations when the selection, performance evaluation, and or any change in the retention or replacement of licensees with whom the facility has a contract and contract occurs*. ~~The bill would prohibit require the governing body from unreasonably withholding approval of to give great weight to those recommendations, as specified.~~

Existing law provides various due process rights for licensees who are the subject of a final proposed disciplinary action of a peer review body, including authorizing a licensee to request a hearing concerning that action. Under existing law, the hearing must be held before either an arbitrator mutually acceptable to the licensee and the peer review body or a panel of unbiased individuals, as specified. Existing law prohibits a hearing officer presiding at a hearing held before a panel from, among other things, gaining direct financial benefit from the outcome.

~~This bill would give the licensee the choice of having the hearing before a mutually acceptable arbitrator or a panel of unbiased individuals. The bill would require the hearing officer presiding at a hearing before a panel to meet certain requirements and to disclose all actual and potential conflicts~~ *require the hearing officer to, among other things, be selected by a process that provides a reasonable opportunity for selection of a mutually acceptable hearing officer and would set forth a process that would satisfy that requirement.* The bill would specify that the hearing officer is entitled to determine the procedure for presenting evidence and argument and would give the hearing officer authority to make all rulings pertaining to law, procedure, or the admissibility of evidence. *The bill would authorize the hearing officer to recommend termination of the hearing in certain circumstances.*

Existing law gives parties at the hearing certain rights, including the right to present and rebut evidence. Existing law requires the peer review

body to adopt written provisions governing whether a licensee may be represented by an attorney *and prohibits a peer review body from being represented by an attorney where a licensee is not so represented, except as specified.*

This bill would give both parties the right to be represented by an attorney, ~~except as specified~~ *but would prohibit a peer review body from being represented if the licensee notifies the peer review body within a specified period of time that he or she has elected to not be represented, except as specified.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 809 of the Business and Professions Code  
2 is amended to read:

3 809. (a) The Legislature hereby finds and declares the  
4 following:

5 (1) In 1986, Congress enacted the Health Care Quality  
6 Improvement Act of 1986 (Chapter 117 (commencing with Section  
7 11101) ~~Title 42, of Title 42 of the United States Code~~), to encourage  
8 physicians to engage in effective professional peer review, but  
9 giving each state the opportunity to “opt-out” of some of the  
10 provisions of the federal act.

11 (2) Because of deficiencies in the federal act and the possible  
12 adverse interpretations by the courts of the federal act, it is  
13 preferable for California to “opt-out” of the federal act and design  
14 its own peer review system.

15 (3) Peer review, fairly conducted, is essential to preserving the  
16 highest standards of medical practice.

17 (4) It is essential that California’s peer review system generate  
18 a culture of trust and safety so that health care practitioners will  
19 participate robustly in the process by engaging in critically  
20 important patient safety activities, such as reporting incidents they  
21 believe to reflect substandard care or unprofessional conduct and  
22 serving on peer review, quality assurance, and other committees  
23 necessary to protect patients.

24 ~~(5) It is the policy of the state that evaluation, corrective action,~~  
25 ~~or other forms of peer review only be conducted for patient safety~~  
26 ~~and the improvement of quality patient care.~~

1     ~~(6)~~

2     (5) Peer review that is not conducted fairly results in harm both  
3 to patients and healing arts practitioners by wrongfully depriving  
4 patients of their ability to obtain care from their chosen practitioner  
5 and by depriving practitioners of their ability to care for their  
6 patients, thereby limiting much needed access to care.

7     ~~(7)~~

8     (6) Peer review, fairly conducted, will aid the appropriate state  
9 licensing boards in their responsibility to regulate and discipline  
10 errant healing arts practitioners.

11    ~~(8)~~

12    (7) To protect the health and welfare of the people of California,  
13 it is the policy of the State of California to exclude, through the  
14 peer review mechanism as provided for by California law, those  
15 healing arts practitioners who provide substandard care or who  
16 engage in professional misconduct, regardless of the effect of that  
17 exclusion on competition.

18    ~~(9)~~

19    (8) It is the intent of the Legislature that peer review of  
20 professional health care services be done efficiently, on an ongoing  
21 basis, and with an emphasis on early detection of potential quality  
22 problems and resolutions through informal educational  
23 interventions. It is further the intent of the Legislature that peer  
24 review bodies be actively involved in the measurement, assessment,  
25 and improvement of quality and that there be appropriate oversight  
26 by the peer review bodies to ensure the timely resolution of issues.

27    ~~(10)~~

28    (9) Sections 809 to 809.8, inclusive, shall not affect the  
29 respective responsibilities of the organized medical staff or the  
30 governing body of an acute care hospital with respect to peer  
31 review in the acute care hospital setting. It is the intent of the  
32 Legislature that written provisions implementing Sections 809 to  
33 809.8, inclusive, in the acute care hospital setting shall be included  
34 in medical staff bylaws that shall be adopted by a vote of the  
35 members of the organized medical staff and shall be subject to  
36 governing body approval, which approval shall not be withheld  
37 unreasonably.

38    ~~(11)~~

39    (10) (A) The Legislature thus finds and declares that the laws  
40 of this state pertaining to the peer review of healing arts

1 practitioners shall apply ~~in lieu of~~ *in addition to* Chapter 117  
2 (commencing with Section 11101) of Title 42 of the United States  
3 Code, because the laws of this state provide a more careful  
4 articulation of the protections for both those undertaking peer  
5 review activity and those subject to review, and better integrate  
6 public and private systems of peer review. Therefore, California  
7 exercises its right to opt out of specified provisions of the Health  
8 Care Quality Improvement Act relating to professional review  
9 actions, pursuant to Section 11111(c)(2)(B) of Title 42 of the  
10 United States Code. This election shall not affect the availability  
11 of any immunity under California law.

12 (B) The Legislature further declares that it is not the intent or  
13 purposes of Sections 809 to 809.8, inclusive, to opt out of any  
14 mandatory national ~~data bank~~ *databank* established pursuant to  
15 Subchapter II (commencing with Section 11131) of Chapter 117  
16 of Title 42 of the United States Code.

17 (b) For the purpose of this section and Sections 809.1 to 809.8,  
18 inclusive, “healing arts practitioner” or “licentiate” means a  
19 physician and surgeon, podiatrist, clinical psychologist, marriage  
20 and family therapist, clinical social worker, or dentist; and “peer  
21 review body” means a peer review body as specified in paragraph  
22 (1) of subdivision (a) of Section 805, and includes any designee  
23 of the peer review body.

24 SEC. 2. Section 809.04 is added to the Business and Professions  
25 Code, to read:

26 809.04. (a) It is the public policy of the state that licentiates  
27 who may be providing substandard care be subject to the peer  
28 review hearing and reporting process set forth in this article.

29 (b) To ensure that the peer review process is not circumvented,  
30 a member of a medical or professional staff, by contract or  
31 otherwise, shall not be required to alter or surrender staff privileges,  
32 status, or membership solely due to the termination of a contract  
33 between that member and a health care facility. *However, with*  
34 *respect to services that may only be provided by members who*  
35 *have, or who are members of a medical group that has, a current*  
36 *exclusive contract for those services, termination of the contract,*  
37 *or termination of the member’s employment by the medical group*  
38 *holding the contract, may result in the member’s ineligibility to*  
39 *provide the services covered by the contract.*

(c) The peer review body of a health care facility shall be entitled to review and make recommendations to the governing body of the facility regarding ~~the quality implications of~~ *quality considerations whenever* the selection, performance evaluation, ~~and or~~ any change in the retention or replacement of licentiates with whom the health care facility has a contract *occurs*. The governing body shall ~~not unreasonably withhold approval of~~ *give great weight to* those recommendations.

(d) This section shall not impair a governing body's ability to take action against a licentiate pursuant to Section 809.05.

SEC. 3. Section 809.07 is added to the Business and Professions Code, to read:

809.07. (a) It is the policy of the state that in certain *limited* circumstances, external peer review may be necessary to promote and protect patient care in order to eliminate perceived bias, obtain needed medical expertise, or respond to other particular circumstances.

(b) A peer review body is encouraged to obtain external peer review for the evaluation or investigation of an applicant, ~~privilege holder~~ *privilegeholder*, or member of the medical staff in the following circumstances:

(1) Committee or department reviews that could affect a licentiate's membership or privileges do not provide a sufficiently clear basis for action or inaction.

(2) No current medical staff member can provide the necessary expertise in the clinical procedure or area under review.

(3) To promote impartial peer review.

~~(4) Upon the reasonable request of the licentiate.~~

~~(e) Under no circumstances may any organization external to the peer review body that provides quality improvement activities perform any activities at the health care facility without the concurrence of and input from the peer review body.~~

~~(d)~~

(c) For purposes of this section, the following definitions apply:

(1) "Peer review body" has the meaning provided in paragraph (1) of subdivision (a) of Section 805.

(2) "External peer review" means peer review provided by ~~an external objective organization engaged in quality improvement activities that has the ability to perform review by~~ *licentiates who are not members of the peer review body; licentiates who are not*

1 *members of the peer review body, who are impartial, and who*  
2 *have the necessary expertise in the clinical procedure or area*  
3 *under review.*

4 SEC. 4. Section 809.08 is added to the Business and Professions  
5 Code, to read:

6 809.08. (a) The Legislature hereby finds and declares that the  
7 sharing of information between peer review bodies is essential to  
8 protect the public health.

9 (b) ~~A~~ Upon receipt of reasonable copying costs, a peer review  
10 body shall respond to the request of another peer review body and  
11 produce the records *reasonably* requested concerning a licentiate  
12 under review to the extent not otherwise prohibited by state or  
13 federal law. The records produced pursuant to this section shall  
14 not be subject to discovery ~~to the extent provided in Section 1157~~  
15 ~~of the Evidence Code. The~~ *the extent provided in Sections 1156.1*  
16 *and 1157 of the Evidence Code and any other applicable provisions*  
17 *of law. The peer review body responding to the request shall be*  
18 *entitled to all—other confidentiality protections and privileges*  
19 *otherwise provided by law as to the information and records*  
20 *disclosed pursuant to this section.*

21 SEC. 5. Section 809.2 of the Business and Professions Code  
22 is amended to read:

23 809.2. If a licentiate timely requests a hearing concerning a  
24 final proposed action for which a report is required to be filed  
25 under Section 805, the following shall apply:

26 ~~(a) The hearing shall be held before a trier of fact, and the~~  
27 ~~licentiate shall have the choice of hearing by either of the~~  
28 ~~following:~~

29 ~~(1) An~~

30 *(a) The hearing shall be held, as determined by the peer review*  
31 *body, before a trier of fact, which shall be an arbitrator or*  
32 *arbitrators selected by a process mutually acceptable to the*  
33 *licentiate and the peer review body.*

34 ~~(2) A body, or before a panel of unbiased individuals who shall~~  
35 ~~gain no direct financial benefit from the outcome, who have not~~  
36 ~~acted as an accuser, investigator, factfinder, or initial decisionmaker~~  
37 ~~in the same matter, and which shall include, where feasible, an~~  
38 ~~individual practicing the same specialty as the licentiate.~~

39 (b) (1) If a hearing officer is selected to preside at a hearing  
40 held before a panel, the hearing officer shall gain no direct financial

benefit from the outcome, shall disclose all actual and potential conflicts of interest *within the last five years reasonably known to the hearing officer*, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote. The hearing officer shall also meet both of the following requirements:

~~(A) Be~~

*(A) (i) Be selected through a process that provides a reasonable opportunity for selection of a hearing officer who is mutually acceptable to the licentiate and the peer review body. If the licentiate and peer review body are unable to agree, they shall utilize the services of the American Arbitration Association or other mutually agreed upon dispute resolution organization. body. For purposes of this subparagraph, the following process shall be deemed to constitute a reasonable opportunity for selection of a mutually acceptable hearing officer:*

*(I) If the licentiate and the peer review body are unable to agree on a hearing officer within 10 business days of the date the peer review body receives the request for a hearing, they shall utilize the services of a third party selection service, as set forth in the applicable bylaws of the peer review body, or if none is specified, that is determined by mutual agreement of the parties within 15 business days of the date the peer review body receives the request for a hearing.*

*(II) If the licentiate and the peer review body are unable to agree on a third party selection service within the period of time required under subclause (I), each party shall have five business days to provide a list of five names of individuals meeting the requirements of subparagraph (B). After receiving this list, each party shall have three business days to strike two names from the list and to rank the remaining names in order of preference by assigning the numeral one to the name with the strongest preference. No name shall be left blank. The candidate with the lowest combined score whose name has not been stricken by either party shall be invited to serve as the hearing officer. In the event of a tie, the matter shall be resolved by lot, which means the drawing from the names of the two candidates with the lowest combined score. If this candidate is not available to serve, the other candidate with the lowest combined score shall be asked to serve. If neither of these two candidates is able to serve, the peer review body may select a hearing officer, who need not be one of*

1 *the individuals remaining on the lists created pursuant to this*  
2 *clause.*

3 *(ii) The timeframe within which a hearing is required to occur*  
4 *under subdivision (h) shall be tolled for purposes of complying*  
5 *with this subparagraph provided that the parties are engaging in*  
6 *a good faith attempt to achieve a mutually acceptable selection of*  
7 *the hearing officer.*

8 (B) Be an attorney licensed to practice law in the State of  
9 ~~California and qualified to preside over a quasi-judicial hearing.~~  
10 ~~Attorneys California.~~ *Except as otherwise agreed by the parties,*  
11 *attorneys from a firm utilized by the hospital, the medical staff,*  
12 *or the involved licentiate within the preceding two years shall not*  
13 *be eligible.*

14 (2) The hearing officer shall endeavor to ensure that all parties  
15 maintain proper decorum and have a reasonable opportunity to be  
16 heard and present all relevant oral and documentary evidence. The  
17 hearing officer shall be entitled to determine the order of, or  
18 procedure for, presenting evidence and argument during the hearing  
19 and shall have the authority and discretion to make all rulings on  
20 questions pertaining to matters of law, procedure, or the  
21 admissibility of evidence. The hearing officer shall also take all  
22 appropriate steps to ensure a timely resolution of the hearing, but  
23 may not terminate the hearing process. *However, in the case of*  
24 *flagrant noncompliance with the procedural rules governing the*  
25 *hearing process or egregious interference with the orderly conduct*  
26 *of the hearing, the hearing office may recommend that the hearing*  
27 *panel terminate the hearing, provided that this activity is*  
28 *authorized by the applicable bylaws of the peer review body.*

29 (c) The licentiate shall have the right to a reasonable opportunity  
30 to voir dire the panel members and any hearing officer, and the  
31 right to challenge the impartiality of any member or hearing officer.  
32 Challenges to the impartiality of any member or hearing officer  
33 shall be ruled on by the presiding officer, who shall be the hearing  
34 officer if one has been selected.

35 (d) The licentiate shall have the right to inspect and copy at the  
36 licentiate's expense any documentary information relevant to the  
37 charges which the peer review body has in its possession or under  
38 its control, as soon as practicable after the receipt of the licentiate's  
39 request for a hearing. The peer review body shall have the right  
40 to inspect and copy at the peer review body's expense any

1 documentary information relevant to the charges which the  
2 licentiate has in his or her possession or control as soon as  
3 practicable after receipt of the peer review body's request. The  
4 failure by either party to provide access to this information at least  
5 30 days before the hearing shall constitute good cause for a  
6 continuance. The right to inspect and copy by either party does  
7 not extend to confidential information referring solely to  
8 individually identifiable licentiates, other than the licentiate under  
9 review. The arbitrator or presiding officer shall consider and rule  
10 upon any request for access to information, and may impose any  
11 safeguards the protection of the peer review process and justice  
12 requires.

13 (e) When ruling upon requests for access to information and  
14 determining the relevancy thereof, the arbitrator or presiding officer  
15 shall, among other factors, consider the following:

16 (1) Whether the information sought may be introduced to  
17 support or defend the charges.

18 (2) The exculpatory or inculpatory nature of the information  
19 sought, if any.

20 (3) The burden imposed on the party in possession of the  
21 information sought, if access is granted.

22 (4) Any previous requests for access to information submitted  
23 or resisted by the parties to the same proceeding.

24 (f) At the request of either side, the parties shall exchange lists  
25 of witnesses expected to testify and copies of all documents  
26 expected to be introduced at the hearing. Failure to disclose the  
27 identity of a witness or produce copies of all documents expected  
28 to be produced at least 10 days before the commencement of the  
29 hearing shall constitute good cause for a continuance.

30 (g) Continuances shall be granted upon agreement of the parties  
31 or by the arbitrator or presiding officer on a showing of good cause.

32 (h) A hearing under this section shall be commenced within 60  
33 days after receipt of the request for hearing, and the peer review  
34 process shall be completed within a reasonable time, after a  
35 licentiate receives notice of a final proposed action or an immediate  
36 suspension or restriction of clinical privileges, unless the arbitrator  
37 or presiding officer issues a written decision finding that the  
38 licentiate failed to comply with subdivisions (d) and (e) in a timely  
39 manner, or consented to the delay.

1 SEC. 6. Section 809.3 of the Business and Professions Code  
2 is amended to read:

3 809.3. (a) During a hearing concerning a final proposed action  
4 for which reporting is required to be filed under Section 805, both  
5 parties shall have all of the following rights:

6 (1) To be provided with all of the information made available  
7 to the trier of fact.

8 (2) To have a record made of the proceedings, copies of which  
9 may be obtained by the licentiate upon payment of any reasonable  
10 charges associated with the preparation thereof.

11 (3) To call, examine, and cross-examine witnesses.

12 (4) To present and rebut evidence determined by the arbitrator  
13 or presiding officer to be relevant.

14 (5) To submit a written statement at the close of the hearing.

15 (6) To be represented by an attorney of the party's choice at the  
16 party's expense, subject to subdivision (c).

17 (b) The burden of presenting evidence and proof during the  
18 hearing shall be as follows:

19 (1) The peer review body shall have the initial duty to present  
20 evidence which supports the charge or recommended action.

21 (2) Initial applicants shall bear the burden of persuading the  
22 trier of fact by a preponderance of the evidence of their  
23 qualifications by producing information which allows for adequate  
24 evaluation and resolution of reasonable doubts concerning their  
25 current qualifications for staff privileges, membership, or  
26 employment. Initial applicants shall not be permitted to introduce  
27 information not produced upon request of the peer review body  
28 during the application process, unless the initial applicant  
29 establishes that the information could not have been produced  
30 previously in the exercise of reasonable diligence.

31 (3) Except as provided above for initial applicants, the peer  
32 review body shall bear the burden of persuading the trier of fact  
33 by a preponderance of the evidence that the action or  
34 recommendation is reasonable and warranted.

35 ~~(e) No peer review body shall be represented by an attorney if~~  
36 ~~the licentiate is not so represented, except dental professional~~

37 *(c) (1) Except as provided in paragraph (3), a peer review body*  
38 *shall not be represented by an attorney if the licentiate notifies the*  
39 *peer review body in writing no later than 15 days prior to the*  
40 *hearing that he or she has elected to not be represented by an*

1 attorney. *Except as otherwise agreed by the parties, this election*  
2 *shall be binding.*

3 (2) *If the licentiate does not provide the written notice described*  
4 *in paragraph (1) within the required timeframe, the peer review*  
5 *body may be represented by an attorney even if the licentiate later*  
6 *elects to not be represented by an attorney.*

7 (3) *Dental professional society peer review bodies may be*  
8 *represented by an attorney, even if the licentiate declines to be*  
9 *represented by an attorney.*